

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **DANIEL RODRIGUEZ-LOPEZ, et al.,**

4 **Plaintiffs,**

5 **v.**

Civil No. 08-1212 (GAG/MEL)

6 **ROMAN VELAZCO-GONZALEZ, et al.,**

7 **Defendants.**

8 **OPINION AND ORDER**

9 Plaintiffs Daniel Rodriguez-Lopez, Brenda L. Bezares-Martinez, and the conjugal partnership
10 formed by them, Daniel Rodriguez-Diaz, Maria de los Angeles Muniz-Pellot, and the conjugal
11 partnership formed by them, Fernando Rodriguez-Diaz, Julia Diaz-Rodriguez, and the conjugal
12 partnership formed by them, Emanuelle D. Rodriguez-Muniz, represented by his parents, Susanne
13 J. Rodriguez-Lopez, and Zoraida Rodriguez-Diaz brought this action against former Secretary of
14 Labor Roman Velazco-Gonzalez, the Labor Department of Puerto Rico (“DOL”), former
15 Superintendent of the Puerto Rico Police Department Pedro A. Toledo-Davila, the Police
16 Department of Puerto Rico, Jose R. Dennis-Tavales, Luis Rodriguez, Carmen B. Carrasquillo-
17 Morales, and the Commonwealth of Puerto Rico for violations of the plaintiffs’ rights as secured by
18 Title VII and § 1983. Defendants DOL and Velazco-Gonzalez moved to dismiss the plaintiffs’
19 amended complaint (Docket No. 50) pursuant to Fed.R.Civ.P. 12(b)(1) and (6). They argue in their
20 motion to dismiss: a) that the Eleventh Amendment bars section 1983, 42 U.S.C. § 1983, actions
21 against a state, state agency, or any state official in his official capacity for monetary damages; b)
22 that plaintiffs’ section 1983 claim is precluded by the Title VII, 42 U.S.C. § 2000e et seq., action;
23 c) that plaintiffs did not comply with Title VII’s statute of limitations; d) that the retaliation claims
24 are time-barred; e) that defendant Velazco-Gonzalez is not personally liable under Title VII; f) that
25 plaintiff failed to establish a tangible employment action in order to have a valid claim under Title
26 VII; and g) that, given that all federal claims fail as a matter of law, the supplemental state law
27 claims should also be dismissed. After reviewing the pleadings, the court **GRANTS** in part and
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1 **DENIES** in part defendants' motion to dismiss (Docket No. 50).

2 **I. Relevant Factual Background as Alleged in the Amended Complaint (Docket**
3 **No. 48)**

4 On October 18th, 2004, plaintiff Rodriguez-Lopez started working at the DOL as both a
5 chauffeur and assistant to defendant Velazco-Gonzalez, Secretary of the DOL. Approximately in
6 December 2005, Velazco-Gonzalez started sexually harassing plaintiff Rodriguez-Lopez on a daily
7 basis. Said sexual harassment consisted of invitations to have sexual relations, vulgar sexual
8 language, showing objects of sexual content to plaintiff, and invitations to stay at Velazco-
9 Gonzalez's home. On occasions, plaintiff Rodriguez-Lopez would drive Velazco-Gonzalez to
10 different social activities and Velazco-Gonzalez would make denigrating comments in front of other
11 DOL officials concerning plaintiff. In one such activity Velazco-Gonzalez compared plaintiff's
12 buttocks with those of an inflatable donkey. In said activity Velazco-Gonzalez and other DOL
13 officials began simulating having anal sex with the inflatable donkey.

14 Velazco-Gonzalez would constantly make daily statements to plaintiff laced with sexual
15 overtones and connotations. On one occasion, while driving Velazco-Gonzalez to the office, he
16 stated to the plaintiff that he had to do things right or else he would "eat his anus." On another
17 occasion plaintiff had to drive other personnel, in Velazco-Gonzalez's official vehicle, to "Condom
18 World" to buy pornographic materials for Velazco-Gonzalez. In one activity at the DOL offices
19 defendant celebrated an official's birthday with pornographic items.

20 On one occasion Velazco-Gonzalez gave plaintiff Rodriguez-Lopez a movie titled "Broke
21 Back Mountain" and ordered plaintiff to see the movie and tell him the following day who was
22 sodomizing whom. The following day Velazco-Gonzalez asked plaintiff which one of the characters
23 was plaintiff. Plaintiff responded that he did not see the movie. Velazco-Gonzalez got angry and
24 told plaintiff that he was the dark haired character for he was the one being sodomized. He further
25 stated that plaintiff could be sodomized because he had big buttocks and could tolerate being
26 sodomized.

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1 Velazco-Gonzalez's sexual harassment compelled plaintiff to present his resignation from
2 employment on August 30th, 2006. Velazco-Gonzalez refused to accept plaintiff's resignation.
3 Instead, Velazco-Gonzalez, in October 2006, transferred plaintiff to the Cooperative Inspector's
4 Office of Puerto Rico. On February 9th, 2007, plaintiff Rodriguez-Lopez filed a sexual harassment
5 complaint against Velazco-Gonzalez at the DOL Anti-discrimination Unit ("ADU"). On February
6 15th, 2007, from approximately 8:00 pm to 11:00 pm, officers of the Puerto Rico Police Department,
7 at the behest of Velazco-Gonzalez and co-defendants Pedro A. Toledo-Davila, Jose R. Dennis-
8 Tavalez, Luis Rodriguez, and Carmen B. Carrasquillo-Morales, went to plaintiff's home and to the
9 home of Fernando Rodriguez-Diaz and Julia Diaz-Rodriguez, co-plaintiffs in this case, searching
10 for plaintiff in order to have him arrested for not notifying a change of address to the Arms Registry
11 Division of the Puerto Rico Police Department. This police operative took place approximately 13
12 hours after the press made public plaintiff's sexual harassment complaint against Secretary of Labor
13 Velazco-Gonzalez. It was covered by the press, at the behest of the police, and made the headlines
14 the following day, portraying plaintiff Rodriguez-Lopez in a bad and false light and defaming his
15 good character and reputation in the community. Furthermore, it was done in an abusive and
16 arbitrary manner. Finally, on June 30th, 2007, defendant Velazco-Gonzalez further retaliated against
17 plaintiff Rodriguez-Lopez by withholding budgetary funds to cover plaintiff's employment with the
18 Cooperative Inspector's Office of Puerto Rico, forcing said office to terminate plaintiff's
19 employment.

20 On February 15, 2008, plaintiffs filed the original complaint in this case (Docket No. 1),
21 which was subsequently amended on November 18th, 2008 (Docket No. 48). In the complaint
22 plaintiffs allege that each of the acts performed by the defendants was done individually, officially,
23 and under color of law in order to intimidate, persecute, and retaliate against plaintiff Rodriguez-
24 Lopez and his family because of his sexual harassment complaint against defendant Velazco-
25 Gonzalez. All defendants are being sued in both their individual and official capacities.

Civil No. 08-1212 (GAG/MEL)**II. Standard of Review**

Under Rules 12(b)(1) and 12(b)(6), a defendant may move to dismiss an action against him for lack of federal subject-matter jurisdiction or for failure to state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(1); Fed.R.Civ.P. 12(b)(6). When considering a motion to dismiss, the court must decide whether the complaint alleges enough facts to “raise a right to relief above the speculative level.” See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The court accepts as true all well-pleaded facts and draws all reasonable inferences in the plaintiff's favor. See id.; Parker v. Hurley, 514 F.3d 87, 90 (1st Cir.2008).

III. Analysis**A. Section 1983 Claim**

Defendants argue that plaintiffs' section 1983 claim is precluded by Title VII. The court agrees. Title VII is the exclusive remedy available to a federal employee complaining about job-related discrimination. Castro v. United States, 584 F. Supp. 252 (D.P.R. 1984). Hence, an action under section 1983 based on the same facts as the Title VII violation is precluded. Castro, 584 F. Supp at 259. In Castro, the court cited Brown v. G.S.A., 425 U.S. 820 (1976), holding that Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment. Therefore, this court holds that Title VII provides an exclusive remedy for claims of discrimination in federal employment and that, therefore, a plaintiff cannot bring a section 1983 claim which is based on the same facts as the Title VII claim. See also Day v. Wayne County Board of Auditors, 749 F.2d 1199, 1204-05 (6th Cir. 1984) (holding that section 1983 cannot be used to enforce Title VII because Title VII has its own remedial enforcement mechanism); cf. Izquierdo Prieto v. Mercado Rosa, 894 F.2d 467, 470 (1st Cir. 1990) (holding that the Age Discrimination in Employment Act and its amendments provide a comprehensive statutory remedy that may not be bypassed through the means of an action under section 1983). For the aforementioned reasons, the court **GRANTS** defendants' motion to dismiss the section 1983 claim as to defendants DOL and Velazco-Gonzalez,

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1 in his official capacity.¹

2 **B. Title VII Claim**

3 *(i) Title VII Time-Barred*

4 Defendants argue in their motion to dismiss that plaintiff failed to comply with Title VII's
5 three-hundred day statute of limitations because plaintiff makes reference to an incident that
6 allegedly occurred in December 2005 and he filed his charge with the ADU on February 9th, 2007.
7 Defendants ignore, however, that the complained-about harassment, as alleged by the plaintiff,
8 occurred continuously from December 2005 until he resigned from his job in August 30th, 2006.
9 Taking the evidence in the light most favorable to the non-moving party, the court would have to
10 find that defendant Rodriguez-Lopez suffered continuous sexual harassment and that the last act of
11 harassment occurred when or immediately before he resigned. According to the continuing violation
12 theory, "the timely filing provision only requires that a Title VII plaintiff file a charge within a
13 certain number of days after the unlawful practice happened." National R.R. Passenger Corp. v.
14 Morgan, 536 U.S. 101, 115 (2002) (holding that in cases of hostile work environment the unlawful
15 employment practice does not occur on any particular day but takes place over a series of days or
16 perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable
17 on its own). "It does not matter, for purposes of the statute, that some of the component acts of the
18 hostile work environment fall outside the statutory time period." Id. "Provided that an act
19 contributing to the claim occurs within the filing period, the entire time period of the hostile
20 environment may be considered by a court for the purposes of determining liability." Id.
21 Accordingly, if the last act occurred on or about August 30th, 2006, and the defendant filed his
22 charge with the ADU on February 9th, 2007, he did so timely insofar as that date is within three-
23 hundred days of August 30th, 2006. For the aforementioned reasons the court **DENIES** defendants'
24 motion to dismiss as to the Title VII claim.

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26 ¹ The section 1983 claim against defendant Velazco-Gonzalez, in his personal capacity,
27 however, shall not be dismissed, as discussed *infra*.

Civil No. 08-1212 (GAG/MEL)*(ii) Retaliation Time-Barred*

Defendants argue in their motion to dismiss that plaintiff's retaliation claim is time-barred because plaintiff failed to file a charge with the Equal Employment Opportunity Commission ("EEOC") within one-hundred and eighty days of the alleged retaliation. Plaintiff, on the other hand, alleges that after the alleged retaliation on February 15th, 2007, plaintiff filed a charge with the ADU complaining about the alleged retaliation. This court finds that this issue need not be addressed here. The First Circuit, in Clockendile v. New Hampshire Department of Corrections, 245 F.3d 1, 6 (1st Cir. 2001), held that "retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency – e.g., the retaliation is for filing the agency complaint itself." In the present case plaintiff Rodriguez-Lopez alleges that he was the subject of retaliation for having filed a charge for sexual harassment with the ADU on February 9th, 2007. Given that plaintiff timely filed his charge for sexual harassment on February 9th, 2007 and received a right-to-sue letter on November 20th, 2007, his claim for retaliation is properly before this court since it sprung from the sexual harassment complaint. For the aforementioned reasons the court **DENIES** defendants' motion to dismiss as to the retaliation claim.

(iii) Individual Liability Under Title VII

The plaintiff concedes, and the First Circuit has previously held, that there is no supervisory liability under Title VII. See Fantini v. Salem State College, 557 F.3d 22 (1st Cir. 2009). Henceforth, this court finds that Secretary of Labor Velazco-Gonzalez is not amenable to suit under Title VII. However, the state employer, here the DOL, is amenable to suit under Title VII as the plaintiff's employer. Therefore, the Title VII claim as to the DOL survives defendants' motion to dismiss. For the aforementioned reasons the court **GRANTS** defendants' motion to dismiss as to Velazco-Gonzalez's individual liability claim under Title VII.

The fact that Velazco-Gonzalez cannot be sued in his personal capacity under Title VII does not preclude a cause of action against him in his personal capacity under section 1983. Paragraph 40 of the Amended Complaint (Docket No. 48) states that, at Velazco-Gonzalez's behest, the police

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1 was sent to plaintiff Rodriguez-Lopez's house and plaintiffs Fernando Rodriguez-Diaz and Julia
2 Diaz-Rodriguez's house searching for plaintiff Rodriguez-Lopez in order to have him arrested for
3 not notifying a change of address to the Arms Registry Division of the Puerto Rico Police
4 Department. It is important to note that Velazco-Gonzalez has not moved to have his section 1983
5 claim dismissed inasmuch as it is based on an action other than sexual harassment. Furthermore,
6 any supplemental claims under Puerto Rico law against Velazco-Gonzalez in his personal capacity
7 remain before this court.

8 (iv) *Tangible Employment Action*

9 When deciding a motion to dismiss the court has to accept as true all well-pleaded facts and
10 draw all reasonable inferences in the plaintiff's favor. "Title VII requires [. . .] that the level of
11 incivility or harassment [. . .] amount to either a tangible or a constructive employment action."
12 Lee-Crespo v. Schering-Plough Del Caribe Inc., 354 F.3d 34, 37 (1st Cir. 2003). "Furthermore, the
13 alleged harassment and the employment action must be causally related." Id. When an employee
14 is the victim of continuous sexual harassment and is forced to resign from his job, he is suffering
15 from a constructive discharge. This is a type of tangible employment action. "For an atmosphere
16 of sexual harassment or hostility to be actionable, we reiterate, the offending behavior must be
17 sufficiently severe or pervasive to alter the conditions of the victim's employment and create an
18 abusive working environment." Pennsylvania State Police v. Suders, 542 U.S. 129, 146-7 (2004)
19 (internal quotations omitted). "A hostile-environment constructive discharge claim entails
20 something more: A plaintiff who advances such a compound claim must show working conditions
21 so intolerable that a reasonable person would have felt compelled to resign." Id. at 147. From the
22 facts alleged in the complaint, it is clear that plaintiff Rodriguez-Lopez suffered from working
23 conditions so intolerable that a reasonable person would have felt compelled to resign. Furthermore
24 an employer, here the DOL, "is subject to vicarious liability to a victimized employee for an
25 actionable hostile environment created by a supervisor with immediate (or successively higher)
26 authority over the employee." Valentin-Almeyda v. Municipality Of Aguadilla, 447 F.3d 85, 95 (1st

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1 Cir 2006). For the reasons stated above, the court **DENIES** defendants' motion to dismiss the Title
2 VII claim as to defendant DOL.

3 **C. Supplemental State-Law Claims**

4 Given that the Title VII claim survived defendants' motion to dismiss the court still has
5 jurisdiction to decide plaintiffs' state law claims. For that reason, the court **DENIES** defendants'
6 motion to dismiss the state law claims for lack of jurisdiction.

7 **IV. Conclusion**

8 For the abovementioned reasons, the court **GRANTS** in part and **DENIES** in part
9 defendants' motion to dismiss.

10 **SO ORDERED.**

11 In San Juan, Puerto Rico this 23rd day of April 2009.

12 S/Gustavo A. Gelpí

13 GUSTAVO A. GELPI

14 United States District Judge
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